TUESDAY MORNING
FEBRUARY 24, 2004

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Bank was robbed at 1 p.m. by a man who brandished a shotgun and spoke with a distinctive accent. The teller gave the robber packets of marked currency, which the robber put into a briefcase. At 3:30 p.m., the police received a telephone call from an anonymous caller who described a man standing at a particular corner in the downtown business district and said the man was carrying a sawed-off shotgun in a briefcase. Within minutes, a police officer who had been informed about the robbery and the telephone call observed Dave holding a briefcase at that location. Dave fit the description given by the anonymous caller.

The officer approached Dave with his service revolver drawn but pointed at the ground. He explained the reason for his approach, handcuffed Dave, and opened the briefcase. The briefcase contained only the marked currency taken in the bank robbery. The officer said to Dave: "I know you're the one who robbed the bank. Where's the shotgun?" Dave then pointed to a nearby trash container in which he had concealed the shotgun, saying: "I knew all along that I'd be caught."

Dave was charged with robbery. He has chosen not to testify at trial. He has, however, moved to be allowed to read aloud a newspaper article, to be selected by the judge, without being sworn as a witness or subjected to cross-examination, in order to demonstrate that he has no accent. He has also moved to exclude from evidence the money found in the briefcase, his statement to the officer, and the shotgun.

How should the court rule on Dave's motions regarding the following items, and on what theory or theories should it rest:

1. Dave's reading aloud of a newspaper article? Discuss.

2. The currency? Discuss.

3. Dave's statement to the officer? Discuss.

4. The shotgun? Discuss.

Question 2

In 1989, Herb and Wendy married while domiciled in Montana, a non-community property state. Prior to the marriage, Wendy had borrowed $25,000 from a Montana bank and had executed a promissory note in that amount in favor of the bank. Herb and Wendy, using savings from their salaries during their marriage, bought a residence, and took title to the residence as tenants in common.

In 1998, Herb and Wendy moved to California and became domiciled here. They did not sell their Montana house.

In 1999, Herb began having an affair with Ann. Herb told Ann that he intended to divorce Wendy and marry her (Ann), and suggested that they live together until dissolution proceedings were concluded. Ann agreed, and Herb moved in with her. Herb told Wendy that he was going to move into his own apartment because he "needed some space." Ann assumed Herb's last name, and Herb introduced her to his friends as his wife. Herb and Ann bought an automobile with a loan. They listed themselves as husband and wife on the loan application, and took title as husband and wife. Herb paid off the automobile loan out of his earnings.

In the meantime, Herb continued to spend occasional weekends with Wendy, who was unaware of Herb's relationship with Ann. Wendy urged Herb to consult a marriage counselor with her, which he did, but Herb did not disclose his relationship with Ann.

In 2003, Wendy and Ann learned the facts set forth in the preceding paragraphs. Wendy promptly filed a petition for dissolution of marriage, asserting a 50% interest in the Montana house and in the automobile. At the time of filing, the Montana bank was demanding payment of $8,000 as the past-due balance on Wendy's promissory note which has been reduced to a judgment. Also at the time of filing, Ann had a $15,000 bank account in her name alone, comprised solely of her earnings while she was living with Herb.

1. What rights do Herb, Wendy, and Ann each have in:
    a. The residence in Montana? Discuss.

    b. The automobile? Discuss.

    c. The $15,000 bank account? Discuss.

2. What property may the Montana bank reach to satisfy the past-due balance on Wendy's promissory note? Discuss.

Answer according to California law.

Question 3

Two years ago, Lawyer represented Sis in her divorce. Last week, Sis made an appointment with Lawyer to assist her father, Dad, with an estate plan.

Sis brought Dad to Lawyer's office. Dad was 80 years old, a widower, and competent. In Sis's presence, Dad told Lawyer he wanted to create a will leaving everything he owned to his three adult children, Sis, Bob, and Chuck, in equal shares. Dad's assets consisted of several bank accounts, which he held in joint tenancy with Sis, and his home, which he held in his name alone. Sis then asked Dad whether he wanted to do something special about his house. Dad thanked Sis for asking, and told Lawyer that he wanted Lawyer to draft a deed that would place his house in joint tenancy with Sis.

At the conclusion of the meeting, Lawyer told Sis and Dad that his customary fee was $750 for drafting such a will and deed. Sis gave Lawyer a check for $750 in payment drawn on her personal account. Lawyer then drafted the will and deed as directed.

What ethical violations has Lawyer committed, and what should Lawyer have done to avoid those violations? Discuss.

THURSDAY MORNING
FEBRUARY 26, 2004

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

Lori owns a small shopping center. In April 1999, Lori leased a store to Tony. Under the lease Tony agreed to pay Lori a monthly fixed rent of $500, plus a percentage of the gross revenue from the store. The lease term was five years. In part the lease provides:

> Landlord and Tenant agree for themselves and their successors and assigns:
>
> * * *
>
> 4. Tenant has the right to renew this lease for an additional term of five years, on the same terms, by giving Landlord written notice during the last year of the lease.
> 5. Tenant will operate a gift and greeting-card store only. Landlord will not allow any other gift or greeting-card store in the center.
>
> * * *

In July 2000, Tony transferred his interest in the lease in writing to Ann. Ann continued to operate the store and pay rent.

In February 2003, a drugstore in the shopping center put in a small rack of greeting cards. Ann promptly complained, but Lori did nothing.

Beginning in March 2003, Ann stopped paying the percentage rent, but continued to pay the fixed rent alone. Lori took no action except to send a letter in April 2003 requesting payment of the percentage rent that was due.

In January 2004, Ann sent a letter to Lori requesting that Lori renew the lease according to its terms. Lori denied that she had any obligation to renew.

1. Is Ann entitled to a renewal of the lease? Discuss.

2. Is Lori entitled to the past-due percentage rent from:

    a. Ann? Discuss.
    b. Tony? Discuss.

Question 5

The National Highway Transportation and Safety Administration (NHTSA), a federal agency, after appropriate hearings and investigation, made the following finding of fact: "The NHTSA finds that, while motor vehicle radar detectors have some beneficial purpose in keeping drivers alert to the speed of their vehicles, most are used to avoid highway speed-control traps and lawful apprehension by law enforcement officials for violations of speed-control laws." On the basis of this finding, the NHTSA promulgated regulations banning the use of radar detectors in trucks with a gross weight of five tons or more on all roads and highways within the United States.

State X subsequently enacted a statute prohibiting the use of radar detectors in any motor vehicle on any road or highway within State X. The State X Highway Department (Department) enforces the statute.

The American Car Association (ACA) is an association comprised of automobile motorists residing throughout the United States. One of ACA's purposes is to promote free and unimpeded automobile travel. ACA has received numerous complaints about the State X statute from its members who drive vehicles there.

In response to such complaints, ACA has filed suit against the Department in federal district court in State X, seeking a declaration that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution. The Department has moved to dismiss ACA's complaint on the ground that ACA lacks standing.

1. How should the court rule on the Department's motion to dismiss on the ground of ACA's lack of standing? Discuss.

2. On the assumption that ACA has standing, how should the court decide ACA's claim that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution? Discuss.

Question 6

Paul and Tom, both State X residents, were involved in an auto accident in State X. At the time of the accident, Tom, who was working as a delivery truck driver for Danco, was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of business in State Z. State Z is located adjacent to State X. Danco does no business in State X.

Paul filed a complaint against Danco in federal district court in State X on the basis of diversity jurisdiction, alleging $70,000 in property and personal injury damages. Danco was properly served with the complaint at its principal place of business.

Appearing specially in the State X federal district court, Danco filed a motion to dismiss the complaint on the grounds that the district court lacked both subject matter and personal jurisdiction and that Paul's action could not proceed without joining Tom. The district court denied Danco's motion.

Danco then filed a counterclaim against Paul to recover $20,000 in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss Danco's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim. The district court granted Paul's motion.

State X law provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States."

1. Did the district court rule correctly on Danco's motion to dismiss Paul's complaint? Discuss.

2. Did the district court rule correctly on Paul's motion to dismiss Danco's counterclaim? Discuss.

TUESDAY AFTERNOON
FEBRUARY 24, 2004

California Bar Examination

Performance Test A
INSTRUCTIONS AND FILE

IN RE SNOW KING MOUNTAIN RESORT

IN RE SNOW KING MOUNTAIN RESORT

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Law Offices of Spence and Hawks
San Obispo, Columbia

MEMORANDUM

TO: Applicant
FROM: Margaret Thompson
DATE: February 24, 2004
RE: **Snow King Mountain Resort**

Our client, Snow King Mountain Resort (SKMR), needs assistance in dealing with its insurance carrier. Yesterday, I spoke to SKMR's CEO, Manuel Lopez, and he sent to me by overnight mail the relevant documents. We've done corporate and real estate work for them in the past, but because they've grown tremendously and this will be a new operation, I asked Manuel to describe the current operations and proposed program in some detail.

SKMR is a ski area and vacation second-home resort complex, which wants to add recreational mountain biking to the list of activities available to its summer guests, with bike trails, aerial tram rides, and trail fees. Everything was set until SKMR's insurer informed them that mountain biking would require the highest risk rating, possibly leading to prohibitive premiums.

Columbia has a recreational use statute, Col. Civil Code, Section 846, which protects a landowner who permits recreational use of her or his land. I'm familiar with the statute, and the insurance company is correct that the statute doesn't specifically refer to mountain biking, nor does it apply when someone charges for access. However, the statute also says that "any recreational purpose" is covered, and Manuel says that SKMR hasn't decided whether or for what to charge.

The insurer's letter is attached. It invites a response, if we believe that the recreational use statute applies. We need to research these issues, respond to the insurance company, and advise SKMR how to set up the program.

Would you please:

1. Draft a persuasive argument to the insurance company in letter form arguing that the recreational use statute will apply. Since you will need to explain to the insurance company how the mountain biking program will be operated, you should assume for purposes of drafting the letter that SKMR will set up the program as you recommend. We need to persuade the insurance company's attorneys and rating professionals, and thus you should discuss relevant case law and, as in writing a brief, assume that they will be aware of contrary cases.

2. Draft a memorandum to Manuel Lopez explaining your advice on how SKMR should operate the program to maximize the likelihood that the recreational use statute will apply. We must make recommendations on whether to charge an access fee; whether to carry mountain bikes on the aerial tram; and whether to sell and rent bikes. I will review both your letter and your memorandum with Manuel, so do not repeat discussions or recommendations contained in the letter, in the memorandum.

Also, in drafting the letter and memorandum, do not address issues of conduct which could result in negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.

MEMORANDUM FROM THE DESK OF MANUEL LOPEZ

TO: Margaret Thompson, Law Offices of Spence and Hawks
DATE: February 23, 2004
RE: **Snow King Mountain Biking Trails**

Thanks for agreeing to respond to this matter. I've attached the memos from my Operations and Marketing Directors and a letter from the insurance agent, and will outline the information about Snow King's organization and operations you requested.

As we discussed, Snow King Mountain Resort (SKMR) wants to add a mountain biking program in the area of the ski hill. It could be a major part of our effort to add activities to our summer operations and become a year-round resort. The summer-season program will fill out the non-ski off season, which the marketing department now calls our "shoulder season."

Full-year operations are not only helpful to our bottom line, but are essential to retain and develop quality employees, sustain real estate development, and retain nationally-recognized commercial tenants. In the last 5 years, real estate sales are way up, and most of our mall tenants are open year-round. Also, in just 5 years, we've built our year-round staff to 38% of our work-force, enough to allow us to extend health and dental benefits to a majority of our employees, initiate modest retirement benefits, and institute profit-sharing for department heads. A summer-season revenue increase of 12% would justify the employee benefits package and probably permit commuter shuttles from town for our employees. Also, I'd like to start on-site childcare for our employees, which our room-care staff says is their number one concern. These may sound trivial in the corporate world, but in the tourist trade, these benefits would set us apart in attracting career-oriented people.

Building year-round operations began with the name change from Snow King Ski Area to the Mountain Resort. Unlike the winter season, which turns on skiing and snowboarding, seasonal operations require that we provide a wide array of activities. In summer, the Concierge Department is the busiest site at the Village. It's now been moved from inside the Lodge to the Village to provide service not just to Lodge guests but to any visitor.

For starters, we enlarged the resort Lodge pool and health center. We've added shuttle service to and discounts at two nearby golf courses, a tennis club, and several white-water

rafting companies. Three years ago, we began summer operation of the ski area's aerial tram, which carries 50 passengers each trip, to the mountain summit. Visitors are encouraged to ride up for the spectacular view, lunch or dine at the summit restaurant, and even hike down. We converted the cross-country ski area to a summer "dude ranch," offering horseback riding and other ranching activities. This year we're starting our tent-auctions weekend series (antiques, classic cars, art), and convention seminar marketing. For the future, we're considering building an alpine slide, and the Marketing Department is even pushing paragliding tandem rides off the summit.

Mountain biking would be the easiest and cheapest new activity to add. As the memo from Sally Johnson, the Mountain Operations Director, indicates, we only need to add a few trails and signage and print trail maps to implement mountain biking. A trail fee would involve designing fee collection points and hiring personnel to collect fees. If we don't charge for access to the trails, there wouldn't even be much additional personnel cost. The Marketing Department is hot to get on this.

You asked that I outline SKMR's operations. As you know, SKMR now is a resort village complex. SKMR owns and operates some properties (such as the Lodge), owns and rents out a mall of shops and restaurants, and has developed and sells condos and residential lots which surround the Village. There are also some independent businesses within the Village, such as the Best Mountain Lodge and Aman Resort, which purchased their properties from SKMR and now operate independently. As a corporation SKMR consists of:

- Snow King Ski Mountain, which includes as its profit centers: lift ticket sales for access to the tram and 10 chair lifts, the village parking, mountain restaurants, ski and board rentals, and the ski and board schools. The majority of the ski area is on United States Forest Service (USFS) land; SKMR is the lessee and obligated by the lease to defend and indemnify the USFS no matter who gets sued.
- Snow King Lodge, which has 450 rooms, three restaurants and many shops.
- Snow King Development Company, which manages the construction of condominiums, chalets, and time-share properties.
- Snow King Realty and Property Management, which owns and sells the properties and owns and manages rentals. The latter include the condos as well as the 17 shops and restaurants which are in Snow King Village Mall.

You asked that I clearly explain all fees that we're considering charging. The first option is a trail fee. It's still an open question, which I haven't decided, and could go either way depending upon its impact on insurance costs. Charging for access would be a change from our present approach. In winter, of course, access to the ski mountain requires that one buy a lift ticket. However, in summer the mountain is open, hikers regularly use the mountain, both accessing it from the aerial tram to hike downhill or just walking up from the Village. There are resident moose, deer, hawks, and 2 pairs of golden eagles. Wildlife viewing has always been popular. As a matter of fact, after the lifts are closed in April, we have always allowed skiers to hike up and enjoy the spring snow. Basically, when the lifts aren't operating, we neither control nor charge for access.

Similarly, mountain bikers could either access the mountain and trails, as they are currently doing on their own by riding up, or by using the tram to get to the top and riding down.

All visitors pay to ride the aerial tram (which is open all year except for April and May). For most summer visitors, the one-ride $10 charge works well, but for mountain bikers we may need to create a multiple-ride or all-day charge, like a winter ski lift ticket. We may add a bike-tram charge, but my initial review of Sally's and Kyle's memos suggests that we will let the mountain bikers bring their bikes for free. We will eventually add bike sales, rental, and service, but I doubt that we've the time and capital to bring it on-line the first year.

Then there are the charges paid by all our guests and visitors. When we finished the Village and Mall, we imposed a parking fee to park within the Village. Charges are by the hour, day, or multiple-day package, and these are reduced in the summer. There's still free parking outside the Village, which is convenient to the Mall, but much less so for the Mountain and Lodge. Outside parking is heavily used, especially in winter when the Village parking lot fills by 10 am.

As I told you, the mountain biking program is still flexible. The Marketing Department thinks it's a win-win situation even if we don't charge for the trails or rent bikes. The bottom line is the insurance cost. We can design the program any way that will get us affordable insurance.

SNOW KING SKI MOUNTAIN

TO: Manuel Lopez
FROM: Sally Johnson, Mountain Operations Director
DATE: February 17, 2004
RE: *Snow King Mountain Biking Sales and Trail Fees*

This will sum up what I've reported at the staff meetings. We can easily have a mountain biking program for the summer. Most of the mountain's ski trails are too steep for ascent and descent, except perhaps for extreme games fanatics. However, the mountain is crisscrossed by snow-groomer access roads and beginner ski trails that would make excellent natural terrain for mountain biking.

You may recall that the idea for mountain bike trails came from discussions I had last summer with the mountain bikers who are already using the mountain for riding. They've given me good information on the best rides, trail links that could be added, trouble spots (usually encounters with hikers at high speed or blind spots). They also have ideas on where we could build some single-track trails, about 30" wide, which are very popular for mountain biking and would link up existing trails. Most of the trail building could be done by our own work crews, and would help provide them more off-season work. I'd budget an additional $35,000 of capital expenditures the first year for trail building, trail maps, and signage, and about $5,000 a year thereafter for maintenance. That would give us the minimum program: no trail fees, equipment sales or rentals, or tram ticket sales, but also very low cost, and assuming that we don't patrol the trails, almost no additional personnel costs.

A mountain bike trail fee would require a minimum of 4 access kiosks, costing around $144,000 in construction, and $172,000 annually to operate, assuming a 7-day, 12-hour operation from June through September. This includes one bike-patroller to prevent access to nonpaying cyclists and for safety. You may recall that we previously rejected the idea of insisting for waivers/hold-harmless to access to the trails because of the expense of access kiosks necessary to enforce such a requirement.

We can also sell mountain bike tram tickets for those who want to take the tram up and ride downhill. This would not add to the tram sales and operations personnel costs. I'd suggest we sell cyclists the same tram $10 one-time tram ticket we sell any other visitor and add

a $25 all-day tram ticket. Bikes would not be allowed inside the tram. The tram engineers can add exterior "hooks" over the ski carriages to carry the bikes, costing about $17,500.

The SKMR ski rental shops can be converted to summertime bike sales and rentals. This would be the largest inventory and personnel expense. We'd have to commit to start a bike shop operation, and hire a manager who could provide a more precise budget and income projections. My ballpark estimate is in the quarter-million dollar range to start.

I checked with the two other shops in the Village Mall that sell outdoor clothing and rent skis and snowboards, Summitt Designs and Ryan's Extreme Sports, and both said that, for summer, they definitely would add bike accessories (clothes, helmets, tubes, some parts), and with enough lead-time perhaps even bike sales, rentals, and repairs. Both strongly endorsed the bike trails idea, and seem eager to add bike sales and rentals to their business lines. Summitt Designs, noting the developing mountain biking business, had already printed up a trail map and distributed it for free last summer. So even without opening our bike shop, we will have bike services for our customers and help our lessees with the struggling off-season.

The Mountain Operations Department needs 2 months notice to design trails and plan construction, about the same for the bike-tram carriage, and 6 to 9 months for the bike shop.

SNOW KING MOUNTAIN RESORT
"THE PLACE TO COME HOME TO"

MEMORANDUM

TO: Manny Lopez
FROM: Kyle Mills, Marketing Director
DATE: February 18, 2004
RE: **Mountain Biking at Snow King Mountain Resort**

Manny, it's great that SKMR will be offering mountain biking to our guests. Marketing-wise I don't see any down-side.

Up-front, mountain biking fits the target demographics of our year-round development plan. Industry research has confirmed the Marketing Department's assumptions. Mountain bike enthusiasts aren't as young as the snowboard crowd. The majority are in the target 25-34 age group, and 35-44 is the second largest grouping. Average incomes and shopping expenditures are second only to golf and tennis guests (average annual income: $58,500). Education: 16.5 years. For casual riders, bike and accessories expenditures average $500. Self-described "serious" riders spend $1,000 to $2,000.

More importantly, mountain biking long-term growth projections are excellent, exceeding all other seasonal participation sports and are almost as strong as snowboarding.

Image-wise mountain biking is again on-target. It will make great visuals for promotions and appeal to the 20-somethings attracted to the image of extreme sports. This year the producers of the Summer Extreme Games will visit SKMR, and, with mountain biking and perhaps paragliding, we could make a viable pitch to be on their venue schedule. The Extreme Games could be our biggest seasonal attraction!

Mountain bikers' spending patterns could be their biggest up-side impact. As you know, our previous research has determined that the average daily expenditure by a summer Lodge guest is $122, and for a nonguest, $37. Income from increased parking, food service, and merchandise sales alone will exceed Operations' estimates of trail construction costs. Our research indicates that expenditures by mountain bike riders should be 20% above our previous projections. Also, I expect that a much higher proportion of mountain

bikers will come from the local and regional markets and pump up the day-use average, probably above $40. (I'll poll it this summer.)

So, even if we don't sell bikes, tram tickets, or trail passes, from an overall economic standpoint, SKMR would have substantial returns by attracting mountain bikers.

Checking the numbers confirms my previous suggestion that we should offer mountain biking to enhance our guests' unique Snow King Mountain experience, and should not charge for trail access. Unlike ski and board operations, trail access fees are not necessary for profitable operations. We can capitalize on free trails in marketing SKMR as a mountain bike park. Obviously, we'll have to charge for access to the aerial tram, just as we do for all other day-guests, but I'd recommend that we add no additional charge for carrying the bikes on the tram.

Our Lodge guest privileges presently include tram fees and parking fees; thus, Lodge guests could mountain bike without feeling that they're paying for trails, parking, or the tram--a great sales talking-point! Free trails may even help counter the "pay-to-play" rap that Marketing is burdened with because of the annual escalation of lift tickets, which next winter will break the $50/day ceiling.

Below are net income projections based on three levels of our marketing effort. The minimum level would probably be appropriate for the first year operations.

		Projected Revenue
Minimum:	Include mountain biking as part of current marketing. No additional expenditures.	$211,680
Modest:	Print advertising, especially regional and specialty publications.	$332,000
Aggressive:	Establish promotional events, races, packaged tours, national specialty publications.	$467,000

These projections don't include additional benefits which are more speculative, but are

nevertheless tangible. When we brought on board the golf, tennis, and ranch operations, real estate sales jumped; mall partners reported similar increases in sales.

Manny, let me know if you'd like anything more from Marketing.

Let's get going!

National Life and Casualty Insurance Company
One City Center Plaza
Suite 1400
Saint Francis, Columbia 99900
(111) 561-8200
www.nationallifecasualty.com

February 21, 2004

Mr. Manuel Lopez
President and Chief Executive Officer
Snow King Mountain Resort
Snow King Village, Columbia 99014

Reference: Snow King--Policy No. 2877408569867

Dear Manuel:

Thanks for giving us the opportunity to bid on insurance coverage for the new mountain biking operations. Mountain biking at Snow King, with its unique natural beauty and congenial atmosphere, could be a huge success. My partner and I love mountain biking, and are out riding almost every weekend. I'm going to talk to Jen about coming up for Memorial Day.

After our conversation, I sent a memorandum to our Rating Department in Colorado and just received a call from them. It's not good news. Rating thinks that mountain biking requires the highest risk rating. Of course, I can't give you an exact premium quote until we get some usage numbers, but for budgeting purposes I fear that you can assume that it will be in the same ballpark as the skiing operations.

I'd suggest that you consider having your lawyer review Rating's conclusions, and, if they think that Rating is incorrect, that they address a letter to me, which I'll pass along to Rating, stating Snow King's position.

For your lawyer's information, here's what our Rating Department states:

First, they acknowledged that Columbia has a recreational use statute, Columbia Civil Code Section 846, which could significantly reduce the risk of liability, and thus the risk rating. However, mountain biking is not one of the enumerated recreational activities, and they believe that the statute will likely apply only to the specifically named recreational activity. Gerkin v. Saint Clara Valley Water District, Columbia Court of Appeal, 1982.

Second, our Rating Department doesn't think that the statute's immunity applies to commercial operations, citing Danaher v. Partridge Creek Country Club, Supreme Court of Michigan, 1981, and Pratt v. State of Louisiana, Court of Appeal of Louisiana, Third Circuit, 1981.

The other alternative would be to set up the operation so that fee collections are sufficient to cover the cost of insurance. This, after all, is the fact of life that we live with in the ski industry, and unfortunately inflicts expensive lift tickets on the public.

We value our relationship as the insurer for Snow King, and will do all we can to provide coverage as you continue to grow the business. Please let me know how you decide to proceed.

Best wishes.

Sincerely,

Tamara Scott

Tamara Scott
Registered Agent

TUESDAY AFTERNOON
FEBRUARY 24, 2004

California
Bar
Examination

Performance Test A
LIBRARY

IN RE SNOW KING MOUNTAIN RESORT

LIBRARY

COLUMBIA CIVIL CODE

§ 846. Permission to Enter for Recreational Purposes

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purposes, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

Schneider v. Mount Desert Island Land Trust

Supreme Court of Columbia (1997)

The State of Columbia is blessed with an abundance of scenic treasures. Its natural landscape contains over 1,100 miles of shoreline, massive mountains, magnificent lakes and sweeping deserts. Such diversity and contrast lend to its appeal as a place where recreational pursuits may flourish, at times on realty owned by others.

In this case we address questions about the scope of Civil Code Section 846, which immunizes landowners from liability for injuries sustained by recreational users of their property. We conclude, under settled principles of statutory construction, that the Legislature defined "recreational purpose" so broadly as to apply to plaintiff's conduct here.

While driving along the coast, plaintiff stopped at Thunder Hole, a spectacular spot within Mount Desert Island Preserve. The Preserve is owned by the Mount Desert Island Land Trust, a private foundation, and is open to the public. Plaintiff parked her car at one of the lots maintained by the Preserve, and she followed the steps down to Sand Beach. She tripped, allegedly because of a defect in the steps, and brought this suit against the Preserve for her resulting injury.

Before entering the Preserve plaintiff had stopped for a cup of coffee and, rather than drink it there (wherever that was) or in the car, she saw a sign ("Sand Beach") and decided to go there to drink it. The Preserve, pleading the statute, sought and obtained summary judgment. Plaintiff appeals. We affirm.

On appeal, plaintiff makes two contentions. First, plaintiff contends that coffee drinking is not within the statutory list, and, second, that she intended none of the named activities. The short answer to the first is that the list does not purport to be complete, but is only illustrative. Any number of clearly recreational activities suggest themselves, from birdwatching to sunbathing, to playing ball on the beach. Neither as a matter of grammatical construction, nor common sense, is the statute to be read as applying only to the recreational activities expressly named.

Section 846 establishes limited liability on the part of a landowner for injuries sustained by

another from recreational use of the land. The statute provides an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming upon the land. Under Section 846, an owner of any estate or other interest in real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration. The landowner's duty to the nonpaying recreational user is, in essence, that owed a trespasser under the common law as it existed prior to Rowland v. Christian, Col. Sup. Ct., 1968; i.e., absent willful or malicious misconduct, the landowner is immune from liability for ordinary negligence.

Thus, the Legislature has established only two elements as a precondition to immunity: (1) the defendant must be the owner of an "estate or any other interest in real property, whether possessory or nonpossessory"; and (2) the plaintiff's injury must result from the "entry or use [of the 'premises'] for any recreational purpose."

Turning first to the "recreational" element of Section 846, we have little difficulty in upholding the trial court's implicit finding that plaintiff entered or used defendant's property for a recreational purpose within the meaning of the statute.

Plaintiff contends that the list of activities set forth in Section 846 is exhaustive. The plain language of the statute does not support such a claim. The statutory definition of "recreational purpose" begins with the word "includes," ordinarily a term of enlargement rather than limitation. To be sure, the principle of *ejusdem generis* provides that "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.]" The examples included in Section 846, however, do not appear to share any unifying trait which would serve to restrict the meaning of the phrase "recreational purpose." They range from risky activities enjoyed by the hardy few (e.g., spelunking, sport parachuting, hang gliding) to more sedentary pursuits amenable to almost anyone (e.g., rock collecting, sightseeing, picnicking). Some require a large tract of open space (e.g., hunting) while others can be performed in a more limited setting (e.g., recreational gardening, viewing historical, archaeological, scenic, natural and scientific sites). Moreover, the statute draws no distinction between natural and artificial conditions;

it specifically mentions "structures," and it obviously encompasses improved streets. Thus, it is not limited to activities which take place outdoors, and does not exclude recreational activities involving artificial structures.

Accordingly, because the list of examples provided by the Legislature does not effectively limit the meaning of "recreational purpose," we conclude that entering and using defendant's property whether to sightsee, drink coffee, or just relax invoked the immunity provisions of Section 846. Therefore, for our purposes here, walking down the beach steps is no different in kind from scaling a cliff or climbing a tree. Each is clearly recreational in nature.

Second, plaintiff contends that she raised a triable issue as to whether she entered the property for recreation. She claims that it could be found that she was not engaged in any recreational activity at all; that the weather was "cool, drizzly, overcast," and she was going "not to swim, sightsee or have a picnic lunch," and that only to drink coffee under such circumstances could be found not recreational. Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the "totality of the facts and circumstances, including . . . the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose." (Gerkin v. Saint Clara Valley Water Dist., Col. Ct. App., 1982)

The consequences of plaintiff's approach would be absurd. The manifest purpose of the Preserve is recreational. Whether plaintiff entered the property to drink coffee or hike is immaterial. In either case, her presence was occasioned by the recreational use of the property, and her injury was the product thereof.

The judgment of trial court, accordingly, is affirmed.

Johnson v. Unocol Corporation

Columbia Court of Appeal (1998)

Under Civil Code Section 846, landowners who permit others to use their property for recreational purposes are immune from liability for injuries suffered by such recreational use of their land. Defendant owns land which it allows the public to use without charge for recreational purposes. Groups or persons using the land must sign a form which, among other things, obligates the user of the land to hold the company harmless from damages for injuries arising out of the use of the land. We hold that under Section 846 the company enjoys immunity from liability for recreational use of its land, and that the hold harmless clause does not constitute consideration which would except the company from the immunity provisions of Section 846.

In this case, plaintiff's employer, Ubex Corporation (Ubex), executed an agreement with Unocol which, *inter alia*, contains a hold harmless clause. Ubex asked Unocol for permission to use Unocol's popular Orcutt Hill Picnic Grounds for its annual company picnic. Unocol agreed to allow Ubex to use its grounds and reserved a specific date for the picnic. Unocol did not charge Ubex for the use of its grounds. Ubex employees knew they could attend simply by purchasing a ticket from the "Aurora Club" to which all Ubex employees automatically belonged. The Aurora Club provided all the food, drink and games at the picnic. Johnson purchased a ticket and attended the picnic. He suffered injuries on the picnic grounds during a game of horseshoes when he leaned against a railing which collapsed and caused him to fall. Johnson sued Unocol for his injuries.

Plaintiff urges us to engraft onto the provisions of Section 846 an extremely broad view of the phrase "good consideration" found in Civil Code Section 1605. Section 1605 states:

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

Plaintiff argues that under Section 1605, the hold harmless paragraph constitutes consideration within the meaning of Section 846.

The hold harmless agreement here requires users to indemnify Unocol from costs and expenses it might incur in defense of claims. Plaintiff therefore argues that because attorney fees are costs of suit under Code of Civil Procedure Section 1033.5, which are not available in the absence of statute or contract, the agreement constitutes consideration. Plaintiff suggests that it is possible a trial court might award attorney fees in a lawsuit because of the agreement with its hold harmless clause. Perhaps, but it is not helpful here to speculate what a court might do if Ubex had filed an action against Unocol.

The purpose of Section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. Courts should therefore construe the exceptions for consideration narrowly.

Such a remote, potential "benefit" to Unocol does not constitute consideration to plaintiff. Plaintiff urges that we so broaden the definition of consideration contained in Section 1605 so as to defeat the purpose of Section 846. However, the meaning of a concept for one purpose may be entirely different for another legislative purpose. Section 846 may preclude immunity "where permission to enter . . . was granted for a consideration . . . paid to . . . landowner . . . or where consideration has been received from others . . . ." The mere potential for reimbursement for defense costs incurred if a suit were filed is neither current payment for entry nor a benefit currently received for entry. Although the disjunctive language in Section 846, "where consideration has been received from others," suggests that consideration is not limited solely to direct payment of entrance fees, we hold that at minimum, consideration received must consist of a present, actual benefit bestowed or a detriment suffered.

Although in some cases the amount of consideration may be slight, Thompson v. United States, U.S. Dist. Ct., Col., 1979, it must be more substantial than what occurred here. A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under Section 846 comes into play.

Because the hold harmless clause in the agreement did not constitute consideration, the exception to immunity in Section 846 does not apply here. We therefore affirm the summary judgment granted Unocol.

Jones v. United States

United States Court of Appeals, Fifteenth Circuit (1982)

Lisa Jones appeals from a judgment in favor of the United States in this suit under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). We affirm.

I. Factual Background

Lisa, then 15 years of age, was severely injured in an accident on April 16, 1977, on a slope at Hurricane Ridge in Olympia National Park in the State of Columbia. She was on an outing sponsored by her church, the Bainbridge Bible Chapel, under the supervision of Joseph B. Barlow. Lisa and her friend, Beverly, each rented an inner tube from National Park Concessions, Inc. [NPC], for one dollar to use for snow sliding. They tubed with others in a "Snow Play Area", designated by a directional sign at the Park lodge. Beverly went down the slope first, mounted on her inner tube stomach down, and rolled off the tube at a level area near the bottom of the slope. Lisa, seated on her tube, was unable to stop, crossed the level area at a high rate of speed, and crashed into a tree, fracturing her spine, shoulder and several ribs.

The District Court granted the government's motion for partial summary judgment, holding the government's liability was controlled and limited by the Columbia Recreational Land Use Act, Col. Civil Code, Section 846, which requires proof that the government's conduct was willful and wanton. The trial judge found that the plaintiff had failed to establish willful and wanton conduct on the part of the government as required by the Columbia Recreational Land Use Act and entered judgment for the government.

II. Was the Government a "Recreational Landowner"?

The issue on this appeal is whether the liability of the United States is controlled by the Columbia Recreational Land User Statute. Under the Federal Tort Claims Act the government is liable for negligent acts and omissions of its employees, "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Since the accident occurred on government land in Columbia, Columbia tort law is applicable.

This court has held that the principle of encouraging landowners to open their land by limiting potential tort liability applies with equal force to the government as to other landowners. Plaintiff contends that the statute applies only to "a landowner who gives up his right to keep out members of the public." She argues that the requisite element of "consent to public use" is not present, noting that Olympia National Park was "reserved and withdrawn from settlement, occupancy, or disposal and dedicated and set apart as a public park for the benefit and enjoyment of the people." Plaintiff argues that while the purpose of the statute is to "encourage" owners to "allow" someone to use their land, that purpose is not met when, as here, the public has a right and expectation to use the land that pre-exists the passage of the Act and the government has no right to bar entry.

Plaintiff's argument that the government should not be treated as a private party under the Columbia recreational user statute because it is somehow obligated to keep the national parks open to the public is unpersuasive. If liability were imposed upon the government in cases such as this one, the Park Service might well choose to close areas of parks to public use or limit the scope, place, or manner of activities. For example, would a National Park superintendent allow snowtubing after a contrary ruling? This result is precisely what the Columbia statute was enacted to prevent. Thus, we hold that the government is entitled to the protection of the Columbia Recreational Land Use Statute and is therefore only liable "[f]or willful or malicious failure to guard or warn against a known dangerous condition."

III. Did Lisa Pay a "Fee" for the Use of the Land?

Plaintiff contends that the government received a "fee" for Lisa's use of the park facilities. She paid the concessionaire, NPC, a dollar to rent an inner tube. NPC pays the government a fixed rental for its facilities (a sales and rental shop) and a percentage of its gross receipts. The District Court concluded that the fee was charged for the use of the inner tube and was not a fee charged for the use of the land. We agree.

The case upon which plaintiff relies, Thompson v. United States, U.S. Dist. Ct., Col., 1979, is distinguishable. There the plaintiff was a participant in a motorcycle race held on federal land in Columbia. The Bureau of Land Management (BLM) had charged the race promoter a $10.00 application service fee and a minimum rental charge of $10.00. The Court concluded that any charge for access was sufficient to preclude application of Columbia

Recreational Land Use Act:

> "If a rental charge is made for the use of the land, it is clear that permission to enter the government land would be 'granted for a consideration', and therefore Columbia Civil Code Section 846 would not apply so as to limit the liability of the landowner."

The Thompson court did not rule that payment for other than access by a land user was sufficient to invoke the exception, as indicated by its statement that:

> "The United States claims that these payments were trivial, inconsequential, and were not rental payments by the plaintiff; that the payments were merely for race permit and that entry to BLM land is free. Although this may turn out to be correct, on review of a motion for summary judgment, we cannot characterize the purpose of the payment."

Here, however, the fee was not charged to members of the public for entry onto the land or for use of the land. Lisa paid the dollar fee to rent the tube. She entered the park without paying a fee. She could have used the Hurricane Ridge or any other area of the park without making any payment if she had brought her own tube. No fee was charged which would deny the United States its immunity under the Columbia statute.

More on point, we believe, is the 1975 Columbia Court of Appeal case of Moore v. City of Torrance. There the plaintiff was injured while riding his bike in a city-owned unsupervised "motocross" track. Plaintiff argued that he had paid consideration for the use of the park by virtue of the fact that his parents pay taxes to support the municipal facilities. The Colombia court rejected the argument, stating:

> "We are certain that this is not the type of consideration that the Legislature had in mind when it included consideration as a factor in Section 846. Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended."

Lastly, we agree with the District Court that, "While it was negligence on the United States's part not to put up signs or ropes, its failure to do so does not rise to the status of willful and wanton conduct under the laws of Columbia." AFFIRMED.

Gerkin v. Saint Clara Valley Water District

Columbia Court of Appeal, First District (1982)

Jo Ann Gerkin through her guardian ad litem appeals from a summary judgment in her action against Saint Clara Valley Water District ("Water District") and other defendants for personal injuries. Gerkin suffered personal injuries when she fell from a bridge located at Little Llagas Creek in the City of Morgan Creek. According to the complaint, Gerkin was injured because the Water District negligently permitted the bridge to remain in a dangerous condition.

In support of the motion for summary judgment, the Water District presented excerpts from the depositions of Gerkin and her younger sister showing that Gerkin was either walking or walking with her bicycle across the two planks which constituted the bridge when she slipped and fell into a dry creek below. In opposition to the motion, Gerkin submitted the declarations of herself, her mother and her sister averring that (1) on the date in question there was no telephone at the apartment where Gerkin was living, (2) Gerkin's mother gave Gerkin and her sister permission to cross the area in order to use the telephone at a market and to buy a candy bar there, (3) Gerkin's purpose in making the trip was to make a phone call and buy a candy bar, and (4) Gerkin walked across the bridge with her bicycle both to and from the store. The trial court granted the motion for summary judgment on the ground that Gerkin "was engaged in conduct specified by Civil Code Section 846."

Section 846 provides that, in the absence of willful or malicious failure to guard or warn of a dangerous condition, an owner of "any estate in real property" owes no duty of care to keep the premises safe for entry by trespassers or licensees who engage in certain specified recreational activities. Included among these specified activities are "hiking", but not bicycle-riding. On summary judgment, Gerkin's claim that she was walking over the bridge when the accident occurred must be accepted.

However, relying on dictionary definitions of "to hike" as "to walk or tramp" and "to go for a long walk," the Water District argues that Gerkin's activity was encompassed within the statute and that summary judgment was therefore proper. It is contended that any test which hinges upon the user's subjective "recreational" intent would read into Section 846 a requirement not stated by the Legislature and lead to "diverse, arbitrary and unjust

results."

Section 846 must be construed in light of the legislative purpose behind it. It is a cardinal rule that statutes should be given a reasonable interpretation and in accordance with the apparent purpose and intention of the lawmakers. The purpose of Section 846 was to encourage landowners to keep their property open to the public for recreational activities by limiting their liability for injuries sustained in the course of those activities. The Water District is therefore incorrect when it contends that to walk across their property necessarily constitutes "hiking" within the meaning of the statute. Both the language and the historical background of Section 846 compel the conclusion that the Legislature did not intend to immunize landowners from liability for all permissive or nonpermissive use of their properties, but only those uses which could justifiably be characterized as "recreational" in nature.

The Water District's contention that "walking" falls within the scope of "hiking" under Section 846 is contrary to principles of statutory construction: First, a construction which implies that words used by the Legislature were superfluous is to be avoided wherever possible. If "hiking" were to be read as including the act of "walking," it would have been unnecessary for the Legislature thereafter to enumerate other types of activities which necessarily involve walking such as camping, rock collecting and hunting. Obviously, "hiking" was intended to denote more than just traveling on foot.

Second, a purely literal interpretation of any part of a statute will not prevail over the purpose of the legislation. This principle is vividly illustrated by that portion of Section 846 which, at the time of the events in question, extended a landowner's immunity to "all types of vehicular riding." Read literally, the statute would preclude anyone traveling in a car from suing the owner for injuries caused by a dangerous condition on his property. It is apparent from the purpose of the enactment, however, that the Legislature was intending to reach only recreational vehicular activity such as motorcycling for pleasure or dune buggying. Likewise, to equate the word "hiking" with mere "walking" or traveling on foot apart from any recreational context would be to ignore the legislative purpose of Section 846 and, in effect, broaden the statute in a manner not contemplated by the lawmakers.

And finally, this court has in past cases applied the rule that statutes in derogation of the common law must be strictly construed. This maxim of construction provides that where

there exists a common law doctrine relevant to the issue presented by the parties and the statute which would change the common law, the legislative intent to change the common law must be clearly expressed. In changing the common law rules applicable to the tort liability of the landowner to the entrant, the legislature has, in Section 846, made a new accommodation of the conflicting rights and interests of landowner and entrant. In Section 846, the legislature has shifted some of the risk from the landowner to the entrant, apparently having decided that the social good of encouraging landowners to open their land to the public for recreational purposes outweighs the social cost of imposing the expense of injuries on the entrant to the land rather than on the landowner who may be in a position to prevent the injury. Section 846 is a statute in derogation of the common law, and should be narrowly interpreted.

We conclude that for an activity to fall within the term "hiking" as it is used in Section 846, it must be proved not merely that the user was "walking" across the property, but that the activity constituted recreational "hiking" within the commonly understood meaning of that word, i.e., to take a long walk for pleasure or exercise.

We agree with the Water District that the test should not be based on the plaintiff's state of mind. We believe, however, that such a determination must be made through a consideration of the totality of facts and circumstances, including the path taken, the length and purpose of the journey, the topography of the property in question, and the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.

There is no showing that Gerkin was "hiking" within the commonly understood recreational sense of the word. On the contrary, Gerkin and her sister crossed the Water District's property because it was the shortest route between their apartment and the supermarket and was a method regularly used by residents in the area. A triable issue of fact was raised as to whether Gerkin was engaged in "hiking" on the subject property such as to permit the Water District to invoke the immunity of landowners set forth in Section 846. It was error to grant summary judgment.

REVERSED.

Danaher v. Partridge Creek Country Club

Supreme Court of Michigan (1981)

Plaintiff Joseph O. Danaher went to the Partridge Creek Country Club to play golf with his son. Upon arrival he decided to walk over to a pond located on the golf course premises. He entered the golf course premises through an open delivery gate and went across a large field to get to the pond. When he arrived at the pond he tossed bread crumbs into the water to feed the fish and in general was viewing the pond to see if it offered any fishing potential. While engaged in this activity he was struck by a golf ball which originated from the fifth tee. The pond was not visible to golfers using the fifth tee. As a result of the accident, Danaher lost his right eye. The jury returned a verdict for Danaher and against the Country Club for $1,000,000.

Defendant sought an instruction based upon the Michigan Recreational Use Statute ("MRUS") which limits liability to one who is on the lands of another without paying to such other person a valuable consideration for certain purposes (such as, fishing, hunting, trapping, camping, hiking, sightseeing, and motorcycling) unless there is a showing of gross negligence or wilful and wanton misconduct. The trial court declined this request and instead instructed on ordinary negligence, ruling that MRUS was not intended to apply to private lands which are used for outdoor recreational uses, but which also constitute commercial enterprises.

In declining defendant's request, the trial court did not discuss the "valuable consideration" exception to the limitation of liability. The courts of appeals have held that it did apply where the consideration was in the form of an "entrance fee." Whether the "entrance fee" for entering the type of lands upon which the kinds of recreational activities described in the statute are carried out is the equivalent of the charge made to play golf need not be determined.

Our review of previous Michigan cases clearly shows that MRUS has been applied consistently to vacant but privately owned land. It has not been applied to circumstances such as those in the present case, where the land is held out for a recreational use to those who pay a fee. It is clear that the character of the land is important and in the present case, the trial court was correct in applying a standard or burden of proof that treated the plaintiff

as a business invitee. Although plaintiff had not purchased the right to play golf that day, he was a golfer who was viewing the premises prior to a decision to actually play golf.

An invitee is one who is on the owner's premises for a purpose mutually beneficial to both parties. The duty which an occupier of land owes an invitee is to exercise ordinary care and prudence to render the premises reasonably safe. A licensee is one who desires to be on the premises of another because of some personal unshared benefit and is merely tolerated on the premises by the owner.

A person who enters the land of another upon business which concerns the possessor of land and upon his invitation expressed or implied is considered an invitee. In some cases permission to enter upon the land was for a consideration. As to such a person the landowner owes a duty of ordinary care. There is a conflict of opinion on the exact definition of an invitee and the basis of the owner's liability. Two theories have developed, i.e., the "economic benefit" theory which embraces a business visitor and the "invitation theory." The economic benefit test imposes an obligation upon the occupier of land when he receives some actual or potential benefit as a result of the entry. The invitation theory imposes a duty based upon a holding out of the premises as suitable for the purpose for which the visitor entered. The Restatement of Torts 2d, Sections 332 and 343, adopts the economic-benefit theory and finds an invitee relationship and a duty to keep the premises safe if the landowner receives any economic benefit from the presence of the visitor or expects to derive any such benefit. Potential pecuniary profit to the possessor of the land is sufficient.

In other cases, we have adopted the invitational theory and find a basis for the liability to the invitee in a representation implied from the encouragement the landowner gives to others to enter to further one of his purposes. To this court, the terms "business invitee," "business visitor," and "invitee" are synonyms, and we have held that when a person enters upon the premises of another and there is a benefit to the other person by the entry or some mutuality of interest, the visitor is an invitee. We recognize a growing tendency of courts to enlarge the duty of landowners in respect to negligence and to minimize the distinction between licensees and invitees either by enlarging what constitutes an economic benefit or by adopting the broader test of the invitation theory.

The Michigan Recreational Use Statute must be considered as a special reversal or

exception to this tendency based upon a special public policy for a limited classification of users. The statute indicates that the landowner owes the ordinary duty of reasonable care to those entering upon his land for certain recreational purposes only if the permission to enter the land is granted for a valuable consideration. Therefore the statute is in derogation of the common law and requires a strict construction. In construing what is meant by "valuable consideration", it is appropriate to look to the legislative history of the section. When the section was enacted, the term "valuable consideration" could have been narrowly or broadly construed. If narrowly construed, only a monetary fee paid to the landowner would have constituted valuable consideration. If broadly construed, the term would have included non-monetary benefits and indirect economic benefits flowing to the owner from the recreational use of his land.

We think a reasonable interpretation of the term "valuable consideration" as used in the statute in light of its history and by its express language means such consideration which at common law could constitute the person entering upon the land as an invitee. Also, this section is in derogation of the common law and we must strictly construe it, which requires a broad construction of the term "valuable consideration." This consideration may be the conferring of a benefit upon the landowner or a mutuality of interest of the landowner and the entrant.

On the instant facts, we think the benefit the defendant expected to receive from increased sales from golfers and other prospective customers was sufficient "valuable consideration" for the general implied permission to the public to use the facilities.

AFFIRMED.

Pratt v. State of Louisiana

Court of Appeal of Louisiana, Third Circuit (1981)

This is a wrongful death and survival action growing out of the drowning of Mark S. Pratt and Darrell Ray Burgess at Indian Creek Reservoir and Recreation Area. The trial court granted motions for summary judgment based on a state statute purporting to exempt or grant immunity from liability to owners of land used for recreational facilities. The statute does not apply to "an owner of commercial recreational developments or facilities." One of the principal issues is whether the recreational area at which the drowning occurred was a commercial development or facility. The trial court held it was not so, and thus that the defendants were exempt from liability from negligence.

The Indian Creek Reservoir and Recreational Area contains an artificial lake with adjacent recreational areas. The lake and facilities are located on land owned by the State through the Department of Natural Resources, Office of Forestry. That agency operates and maintains the facility under a contract entered into by the two public bodies.

The State contends that it is exempted from liability by the Louisiana Recreational User Statute, which reads in pertinent part:

> "Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby: 1) Extend any assurance that the premises are safe for any purposes; 2) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed; 3) Incur liability for any injury to person or property incurred by such person."

The State contends that the phrase "commercial recreational developments or facilities" should be read to equate a commercial recreational enterprise with an establishment run for profit. The State argues that the Indian Creek area is not run for profit and therefore is not to be considered a commercial recreational enterprise with an establishment run for profit.

In view of these conclusions, what factors render a recreational facility a commercial one?

The trial court worked the matter out on the basis of whether the enterprise contemplates the earning of a profit. In McCain v. Hackberry Recreation District, United States District Court, W.D. Louisiana, 1983, the federal district court, applying the Louisiana statute, reached a similar conclusion: "As to whether or not the pool is a commercial recreational development, this court is convinced that the pool does not meet the standards necessary to be so classified. As the Act indicates, the mere fact that some admission price is charged will not necessarily render a facility a commercial recreational development. The test of a facility's "commercial" nature is based on whether the facility was run primarily for profit. In this case, the District did not run the pool with the intention of generating a profit. In fact, an admission fee of only 25 cents to 50 cents was charged for use of the pool. The court is satisfied that these nominal charges do not indicate a managerial philosophy oriented toward profit maximization."

We too are convinced that in the context of the facts of the case before us, profit as a primary objective of the venture would be essential to render it commercial.

Plaintiffs place heavy reliance on the fact that fees are charged for use of the recreational facilities. Regarding this point some reasonable effect must be given to the use in the statute of the words "with or without charge." The critical words are: "an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes . . . does not thereby . . . (3) Incur liability for any injury to person or property incurred by such person." Clearly the use of the words "with or without charge" must be construed to mean that charging fees for use of recreational facilities does not in itself render the operation and maintenance of such facilities a commercial venture. Logically there would have been no reason to include these words in the statute unless it was for the purpose of providing that charging fees would not render an operation commercial. The provision becomes significant only when a fee is charged.

Thus we conclude that the Indian Creek Reservoir and Recreational Area is not a commercial enterprise. Under the circumstances it was the purpose and policy of the Legislature to provide non-liability of defendants for the acts of negligence alleged in plaintiffs' petition.

THURSDAY AFTERNOON
FEBRUARY 26, 2004

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

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INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States, and refers to the fictional State of Franklin, another one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the task you are to complete.
5. The **Library** contains the legal authorities needed to complete the task. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

COYLE & COOPER, LLP
6620 DWIGHT PROMENADE
SPRING VALLEY, COLUMBIA 55510

MEMORANDUM

To: Applicant
From: Vivian Coyle
Date: February 26, 2004
Subject: **In re Progressive Builders, Inc.**

We have been retained by John May, the owner of Progressive Builders, Inc. (PBI), a residential property construction company, to give ongoing legal advice.

In the course of my initial interview with Mr. May, a question arose about a form contract that PBI has used for the past several years outside of Columbia, and specifically about its provision for arbitration of disputes. Mr. May has tentatively agreed to build a house in Columbia for the restaurateur Pier Nittardi, and wants to use the arbitration provision here. I have made an appointment to discuss the matter with him tomorrow, and have told him that I will have a letter delivered to him beforehand to help guide our discussion.

Please prepare, for my signature, a pre-counseling letter for delivery to Mr. May, in which you do the following:

1. State your understanding of the goals that Mr. May seeks to achieve by using the arbitration provision.

2. In light of Mr. May's goals, discuss the likely consequences of keeping the arbitration provision as-is.

3. Identify and discuss possible steps that Mr. May might take when preparing to enter into any particular contractual relationship, such as that with Mr. Nittardi, in order to maximize the chances that the arbitration provision would be enforceable in Columbia as-is.

4. Identify and discuss possible changes Mr. May might make to the arbitration provision to most fully achieve his goals and to most likely render it enforceable in Columbia.

In preparing the pre-counseling letter, remember that Mr. May is a layperson. Although you must discuss the law, you should do so as clearly and concisely as possible, with a recognition that you are not writing to an attorney.

TRANSCRIPT OF INTERVIEW OF JOHN MAY AND FRANK MAY

VIVIAN COYLE: With your permission, I'll be tape-recording our conversation today?

JOHN MAY: Yes.

FRANK MAY: Of course.

COYLE: Let's back up and summarize how we got to where we are now. John, you were referred to our firm by Peter Padilla, of Padilla Construction Company, one of our clients.

JOHN MAY: That's right. I wanted to establish an ongoing relationship with a law firm in Columbia that had experience with the residential property construction industry. To avoid any legal problems in the first place, you understand, and then to avoid wasting time and money in educating some lawyer on an emergency basis in the event that some such problem should in fact arise.

COYLE: Prior to turning on the tape recorder, John, you and I executed the standard written retainer agreement provided by the Columbia State Bar.

JOHN MAY: Yes, we did.

COYLE: Why don't you state the gist of what you told me about PBI?

JOHN MAY: Sure. Frank and I started PBI here in Spring Valley in Columbia in the mid-1970's. We incorporated it here; we'd always been its sole shareholders, 50-50; I'd always been the President and he'd always been the Vice-President.

COYLE: And what does PBI do?

JOHN MAY: We're a construction company that does residential property. Earlier on, we did small repairs, a bit more complex than handyman work, but then we started to do remodels and eventually construction of new houses.

FRANK MAY: By the early 1980's, we had concentrated on major remodels and new construction. That's all we've done ever since.

COYLE: Just to clarify, you work only on residential property?

FRANK MAY: That's right. When we first started out, we took any job we could get, doing anything we could do, or thought we could do, whether it was residential or commercial or even industrial. But not since the early '80's.

COYLE: More clarification: You work on single-family residences or duplexes or apartments . . . ?

FRANK MAY: No, just single-family residences. Again, in the early days we did anything and everything. But since the early '80's, only residential, and only single-family.

COYLE: By the '90's, what had happened?

JOHN MAY: Politics were heating up here in Columbia and so were property values. Each of us was married by then and had children. With the cost of housing, the only way we could move up was to move out. And there was the State of Franklin right next door. It was somewhat backward. But you could buy land for a song.

COYLE: And the politics?

JOHN MAY: Right. With the tightening of building requirements and environmental regulations and assorted red tape, it took more time and money to get anything built. And that meant that the business was becoming less profitable.

FRANK MAY: So, we both moved to Franklin with our families and moved the business there too. Our first major jobs were building our own houses.

COYLE: Let me return to the politics. Didn't one of you mention something about what you called the "litigation climate"?

JOHN MAY: I did. The "litigation atmosphere." When we started out in the mid-'70's, there was relatively little suing and being sued. I'm not saying there were no disputes. In construction, there're always disputes, especially when you're remodeling someone's house or building him a new one. But we just worked things out, working with each other, the builder and the owner. As the '90's rolled around, that had begun to change. At job sites you'd hear, "See you in court," more often, I'll bet, than you hear it here at your law firm.

COYLE: Well . . .

FRANK MAY: John's exaggerating somewhat, but not much.

COYLE: But did you two have any bad experiences?

JOHN MAY: We didn't, but our friends in the business did, including Pete Padilla, who recommended you to me. Look, our business is construction and not law. From what I've heard, legal problems don't simply cost you a lot of money for lawyers. What's worse, they can pull you away from work for a huge amount of time, and then distract you when you finally get back to work and make you much less efficient.

COYLE: And so . . .

JOHN MAY: And so, we went to Franklin, where the atmosphere wasn't so sue-crazy, at least not then.

COYLE: You went there in the early '90's?

FRANK MAY: That's right. Since then, we continued our concentration on major remodels and new construction, but moved to the higher end as more and more wealthy people from around the country have looked to Franklin for their second or third homes.

COYLE: What do you mean by "higher end"?

JOHN MAY: Contract prices of between $450,000 and $850,000 and up.

COYLE: Okay. Your work has been in Franklin exclusively?

JOHN MAY: Yes, except for a job or two now and again in Columbia, as a favor for a friend, like the house we built two years ago for Pete Padilla's daughter Sophia, who is Frank's goddaughter.

COYLE: What about your subcontractors, have you drawn them exclusively from Franklin?

JOHN MAY: Just about. We've always subcontracted as little work as possible. It's sometimes been a pain to do a lot ourselves, but it's more of a pain to lose control of quality. Of course, we still had to subcontract, particularly the specialty trades, like plasterers and ornamental metal workers. Also foundation work, which demands heavy equipment and lots of concrete and rebar. But all that's mostly local.

COYLE: But here you are in Columbia.

JOHN MAY: Right. Demand for our kind of high-end residential construction has been heating up in this area in Columbia for quite some time. The rich folks who were flocking to Franklin from around the country for their second or third homes have started flocking here as well. Demand hasn't cooled down much in Franklin — but this business is cyclical. So I decided to move back into the Columbia market.

FRANK MAY: Not me, though. John's moved back with his family. He's already set up an office here in Spring Valley. I sold him my interest in PBI. With the money, I've started my own business in Franklin, Frank May Construction, Inc.; I'm working out of our old office there. Now PBI is all John's.

COYLE: That's about all of the background, isn't it? John, your move back led you to talk to Pete Padilla, and Pete Padilla led you to our firm.

JOHN MAY: Right.

COYLE: And in the course of our conversation, you told me about some of your general concerns.

JOHN MAY: Right again. I'm a builder, not a lawyer, and I need to avoid litigation and its costs if I want to stay profitable. Even Franklin's become more sue-crazy. I just want to make sure I don't make any missteps as I come back here.

COYLE: It was in this connection that you happened to mention your form contract and to give me this copy of it. Right?

JOHN MAY: Yes. We've been lucky over the years. The contract's been part of our luck. You might not believe it, but we've never been sued. The main reason is that we've done very good work, and done it on time and within budget. We've also made sure that we fix our own mistakes on our own initiative. We provide old-fashioned honest value, and that's

our reputation. Our contract is simple and uncluttered, and communicates the message of honest value: It specifies what you pay and what we do. That's just about it.

COYLE: Plus arbitration.

JOHN MAY: Plus arbitration. That's important to me. I've just got to avoid the costs of litigation, both the money costs and the time costs. I've seen how they've eaten up friends of ours, builders whose businesses were more profitable than ours, until one or two big lawsuits hit. What I also worry about are punitive damages. All the time I read about some business that screws up a few thousand dollars' worth, and then has to pay a few million in punitive damages. I couldn't survive that. You can't run a business with an open-ended risk like that. You know I can't get insurance to cover that, don't you?

COYLE: Yes, I do. But let me ask you this question: Why do you specify arbitration by the National Arbitration Organization ("NAO")?

JOHN MAY: Two reasons. One is that the NAO was founded in Columbia around the time we started out in the mid-'70's, and we wanted to support a local business. The other is that it focused on construction disputes.

COYLE: How much does the NAO charge for arbitration?

JOHN MAY: You know, I really don't know. Years ago, the first time I tinkered with the arbitration provision and inserted the NAO clause, I think I had a list of charges. But we never became involved in any arbitration with our clients. Whatever disputes arose, we settled them ourselves, by give and take.

COYLE: Let me back up for a moment. You said you "tinkered" with the arbitration provision. Did you actually draft the arbitration provision or any other part of the contract?

JOHN MAY: I wouldn't use the word "draft." Over the years, I've seen lots of contracts. I just took shreds and patches and tried to sew them together to make a whole contract. And I'd mend those pieces from time to time. Basically, over the years, I took out as many words as I could, and simplified the ones that were left.

COYLE: Did you, or do you, negotiate with clients about the terms of the contract?

JOHN MAY: Well, there are all those blanks — you have to come to some agreement with the client on the work to be done, the cost, the schedule, you know.

COYLE: I know. But in addition to filling in the blanks, do you negotiate with clients about the terms of the contract?

JOHN MAY: Well, I don't know how to answer that. I can't remember anybody wanting to change anything. If they get the work they want, at the price they want, on the schedule they want, well, that's about it.

COYLE: What about the arbitration provision? It requires the client to arbitrate but not you.

JOHN MAY: No, I can't remember anybody wanting to change that either. I'd never thought about whether I'd be required to arbitrate if I had a claim. The arbitration provision doesn't say so, but I'd never thought about it.

COYLE: Before I forget, let me add that it's my understanding that your concerns about the contract have not arisen in the abstract.

JOHN MAY: Sorry. That's right. I'm finalizing an agreement which I hope to wrap up in a week or two, to build a house for Pier Nittardi in Bradfield, which is only a few miles away from Spring Valley, here in Columbia.

COYLE: Nittardi is the chef and owner of *Il Pavone*, a restaurant there, isn't he?

FRANK MAY: Yes. John and I have known him for quite some time. He's remarrying his ex-wife Jean.

JOHN MAY: This project will be bigger than any of the jobs Frank and I did together. It couldn't be more important.

COYLE: And before you reduce it to contract, you want to know what contract to reduce it to?

JOHN MAY: That's right.

COYLE: Fine. Before we conclude, let's sum up what you want to do, and what you want me to do, with respect to the contract.

JOHN MAY: Basically, I want to use the contract in Columbia, just as we used it in Franklin, and of course I want to use it for Pier's house.

COYLE: Without modification?

JOHN MAY: Yes, without modification, if possible. I want the contract to change only as necessary. The important thing is for the contract to be understandable and to get the job done.

COYLE: I understand. But Columbia's law is different from Franklin's. So even if it didn't need any fixing there, it might need some fixing here. That will depend on all sorts of things. For instance, will your subcontractors come from Columbia? What about your suppliers?

JOHN MAY: Who knows? As I said, in Franklin we used mostly Franklin subs. Also mostly Franklin suppliers. It's conceivable I could use some of those Franklin folks in Columbia, but it's 200 miles away, so I don't know how likely it is.

COYLE: Give me some time to research the issues. Can you come by again perhaps on February 27th so that we can discuss the matter?

JOHN MAY: Sure. How about 2 o'clock?

FRANK MAY: There's no need for me to return. I'm the fifth wheel, since PBI is all John's now. I just came today because John asked me, to help him with any background you might need to know. Also, I've got to get back to a job in Franklin.

COYLE: Frank, that's fine with me. Thanks for coming. John, two o'clock is good for me too. By noon on February 27th, I'll have a letter delivered to you to assist in focusing the discussion.

JOHN MAY: That'll be fine. Thanks so much.

COYLE: You're welcome. Good-bye.

FRANK MAY: Good-bye.

JOHN MAY: 'Bye.

PROGRESSIVE BUILDERS, INC., CONTRACT

1. Parties to this Contract:
    A. Contractor:
        Progressive Builders, Inc.
        4333 Skillman Avenue, Woodhaven, Franklin 65377
        (656) 425–7900, (656) 425–7905 (fax)
    B. Property Owner:
        _____ (Name)
        _____ (Address)
        _____ (Telephone and Fax Numbers)

2. Location of Work: _____

3. Completion Dates:
    A. Estimated date of commencement: _____
    B. Estimated date of completion: _____

4. Contract Price: $_____

5. Method and Schedule of Payment: _____
    Note: The initial down payment must equal at least one-third of the contract price.

6. Description of the Work: _____

7. Warranty: Contractor provides the following warranty to Property Owner, to the exclusion of all other warranties, express or implied: Contractor warrants that the work will be free from faulty materials; constructed according to the standards of the building code applicable to this location; and constructed in a skillful manner and fit for habitation.

8. Arbitration of Disputes: If a dispute arises concerning the provisions of this contract or its performance, Property Owner agrees: (1) to submit any such dispute to binding and final arbitration under the rules of the National Arbitration Organization (NAO); and (2) to limit any relief that may be awarded by the NAO to compensatory damages. Contractor and Property Owner agree to bear the costs of arbitration equally.

9. Additional Provisions:

A. _____

B. _____

C. _____

10. Contract Acceptance:

Signature of Contractor: _____

Date: _____

Signature of Property Owner: _____

Date: _____

THURSDAY AFTERNOON
FEBRUARY 26, 2004

California
Bar
Examination

Performance Test B
LIBRARY

IN RE PROGRESSIVE BUILDERS, INC.

LIBRARY

SELECTED PROVISIONS OF THE FEDERAL ARBITRATION ACT

Section 1. ***Definitions*.**

* * *

"Commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

* * *

Section 2. ***Policy in Favor of Arbitration*.**

A written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* *

SELECTED PROVISIONS OF THE COLUMBIA CODES

Section 3282 of the Columbia Civil Code. *Compensatory Damages*.

Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called compensatory damages.

* * * * * * *

Section 3294 of the Columbia Civil Code. *Punitive Damages*.

In an action sounding in tort, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to compensatory damages, may recover punitive damages for the sake of example and by way of punishing the defendant.

* * * * * * *

Section 1281 of the Columbia Code of Civil Procedure. *Policy in Favor of Arbitration*.

A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

* * * * * * *

Section 7191 of the Columbia Business and Professions Code. *Arbitration and Residential Property Work and Construction*.

(a) If a contract for construction of, or work on, residential property with four or fewer units contains a provision for arbitration of a dispute between the parties, the provision shall be clearly titled “ARBITRATION OF DISPUTES,” and shall be set out in capital letters.

(b) Immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision described in subdivision (a), and immediately following that arbitration provision, the following shall appear, and shall be set out in capital letters:

“NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE ‘ARBITRATION OF

DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY COLUMBIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

(c) Notwithstanding any law to the contrary, a provision for arbitration of a dispute between parties to a contract for construction of, or work on, any residential property with four or fewer units that does not comply with this section is not enforceable against any party other than the party performing the construction or work.

*** * * * * * ***

Section 7195 of the Columbia Business and Professions Code. *Residential Property Work and Construction and Treble Damages as Punitive Damages*.

In an action sounding in tort arising from construction of, or work on, residential property with four or fewer units, where it is proven by clear and convincing evidence that the person or entity performing the construction or work has been guilty of oppression, fraud, or malice, the person or entity for which the construction or work is performed, in addition to compensatory damages, may recover an additional amount up to three times the amount of compensatory damages as punitive damages for the sake of example and by way of punishing the person or entity performing the construction or work.

Doctor's Associates, Inc. v. Casarotto

United States Supreme Court (1996)

We granted certiorari in this case to settle an important issue relating to the Federal Arbitration Act.

A dispute arose between parties to a standard franchise contract for the operation of a Subway sandwich shop in Montana.

Paul Casarotto, the franchisee, sued Doctor's Associates, Inc. (DAI), the franchisor, in Montana state court.

The Montana trial court stayed the lawsuit pending arbitration pursuant to an arbitration provision set out in ordinary type on page nine of the franchise contract.

The Montana Supreme Court reversed, holding that the arbitration provision was unenforceable because it did not meet a requirement under section 27-5-114(4) of the Montana Code that "[n]otice that a contract is subject to arbitration" must be "set out in underlined capital letters on the first page of the contract." DAI argued, unpersuasively, that section 27-5-114(4) of the Montana Code was preempted by section 2 of the Federal Arbitration Act pursuant to the Supremacy Clause of Article VI of the United States Constitution, inasmuch as section 2 of the Federal Arbitration Act declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Although DAI's argument failed to persuade the Montana Supreme Court, it succeeds in persuading us. Section 27-5-114(4) of the Montana Code with its special notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with, and is therefore displaced by, section 2 of the Federal Arbitration Act. Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration provisions without contravening section 2 of the Federal Arbitration Act. But courts may not invalidate arbitration provisions under state laws applicable *only* to arbitration provisions — whether such laws cover arbitration provisions in *all* contracts *generally*, or merely touch arbitration provisions in *some* contracts or classes of contracts *specifically*. By enacting section 2 of the Federal Arbitration Act, Congress precluded states from singling out arbitration provisions for suspect status. Section 27-5-114(4) of the Montana Code directly conflicts with section 2 of the Federal Arbitration Act because the state law conditions the enforceability of arbitration provisions on compliance with a special notice requirement not applicable to contracts generally. In concluding to the contrary, the Montana Supreme Court erred prejudicially.

Reversed and remanded.

Sisters Of The Visitation v. Cochran Plastering Company

Columbia Court of Appeal (1997)

The Sisters of the Visitation ("The Sisters") appeal from a judgment of the Superior Court of Mosswood County enjoining an arbitration proceeding initiated by them in a dispute with Cochran Plastering Company, Inc. ("Cochran"). The Sisters are a Roman Catholic religious order that owns and operates a monastery that is a registered landmark under the Columbia Registered Landmarks Act. The Sisters began a restoration project to repair and restore the monastery's chapel. The Sisters engaged the services of Hall Baumhauer Architects, P.C., a Columbia company, and entered into contracts directly with contractors, from Columbia and several other states, within specific trades included in the scope of work for the project.

The Sisters entered into a contract with Cochran, a Columbia company, for Cochran to repair cracks in the plaster in the ceilings and wall of the chapel, to cast and install plaster moldings, and to pin up all loose moldings with screws and washers. This contract included an arbitration provision, pursuant to which the Sisters filed a demand for arbitration; in the demand for arbitration, the Sisters claimed that Cochran had negligently damaged decorative paintings on the surface of the chapel ceiling and walls and that Cochran had failed to complete its work. The Sisters claimed a total of $525,000 for restoration of paintings they claimed Cochran had damaged and $50,000 for the completion of the repair work.

Cochran filed an action in the Superior Court for an injunction to stop the arbitration proceeding. Cochran claimed as follows: The arbitration provision of its contract with the Sisters is unenforceable under the terms of the Columbia Registered Landmarks Act; Section 2 of the Federal Arbitration Act does not displace the Columbia Registered Landmarks Act through operation of the Supremacy Clause of Article VI of the United States Constitution because Section 2 of the Federal Arbitration Act is inapplicable inasmuch as the contract does not evidence a transaction involving interstate commerce. Accepting Cochran's claim after a bench trial, the Superior Court rendered judgment in its favor. The Sisters appealed. We now affirm.

Section 2 of the Federal Arbitration Act states that "[a] written provision in a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

There is no dispute that, under the Columbia Registered Landmarks Act, the arbitration provision of the contract between the Sisters and Cochran would be unenforceable because the act expressly declares that all arbitration provisions of all contracts involving registered landmarks are unenforceable.

Neither is there any dispute that if Section 2 of the Federal Arbitration Act is applicable, the arbitration provision of the contract between the Sisters and Cochran would in fact be enforceable because there is no reason to refuse enforcement, such as unconscionability, based on contract law generally. Nor is there any dispute that if Section 2 of the Federal Arbitration Act is applicable, it would displace the Columbia Registered Landmarks Act, which is a state law that "touch[es] arbitration provisions in *some* . . . classes of contracts *specifically*" (*Doctor's Associates, Inc. v. Casarotto* (U.S. Supreme Ct. 1996), italics in original).

As we shall explain, we believe that Section 2 of the Federal Arbitration Act is, in fact, inapplicable because the contract between the Sisters and Cochran does not evidence a transaction involving interstate commerce.

At the outset, we state what is now settled: A contract evidences a transaction involving interstate commerce only if it affects such commerce substantially. The presence or absence of substantial effect on interstate commerce depends on the totality of the circumstances — to which we now turn.

First, the Sisters and Cochran are both Columbia residents, and the contract was to be performed in Columbia. The only affiliation of either of the parties with any out-of-state person or entity is found in the relationship between the Sisters and the Roman Catholic Church. We are simply not prepared to recognize that relationship as involving interstate *commerce*. Hence, we discern no substantial effect on interstate commerce on that basis.

Second, although Cochran brought tools and equipment to the project site, it obtained them within Columbia. In connection with the project, a substantial contract for the rental of scaffolding was placed with an out-of-state party; *that* contract, however, did not involve Cochran but was let directly by the Sisters. No substantial effect on *interstate* commerce can be developed based on Cochran's acquiring in *intrastate* commerce any tools and equipment to be used in the performance of its contract.

Third, Cochran employed only Columbia residents as workers. The contract apparently specified the use of plaster and washers that were required to be obtained from a materials company in Ohio, and it called for insurance, which was obtained from an

insurance company in New York. However, the record shows that little of the amount the Sisters paid Cochran is allocable to the cost of these materials and services. Hence, Cochran's contract does not substantially affect interstate commerce by reason of a dependence upon materials and services moving in interstate commerce.

Fourth, the object of the services provided by Cochran is incapable of subsequent movement across state lines. The Sisters contracted with Cochran to perform plaster work in the monastery chapel in Mosswood County, Columbia. Cochran's work becomes a part of the chapel's structure, and cannot be detached and moved across state lines. The fact that people from out of state might visit the site is too tenuous a connection with interstate commerce. Therefore, we conclude that Cochran's work will not have a substantial effect on interstate commerce on this basis.

Fifth and final, we note that the Sisters entered into a series of contracts for the restoration of the monastery chapel related to their contract with Cochran. But the fact that several of the related contracts might have a substantial effect on interstate commerce does not mean that the contract between the Sisters and Cochran itself has any such effect.

Therefore, we conclude that Section 2 of the Federal Arbitration Act is, in fact, inapplicable because the contract between the Sisters and Cochran does not evidence a transaction involving interstate commerce for, under the totality of the circumstances, it does not affect such commerce substantially.

It follows that under the Columbia Registered Landmarks Act — which is *not* displaced by Section 2 of the Federal Arbitration Act — the arbitration provision of the contract between the Sisters and Cochran is unenforceable because the Act expressly declares that all arbitration provisions of all contracts involving registered landmarks are unenforceable.

Affirmed.

Stirlen v. Supercuts, Inc.

Columbia Court of Appeal (1997)

The Superior Court of Santa Fe County denied a motion to compel arbitration pursuant to the arbitration provision of an employment contract on the ground that that provision was unenforceable because it was unconscionable. We find its order correct and affirm.

Defendant Supercuts, Inc. ("Supercuts"), a Delaware corporation that conducts a national hair care franchise business, appeals from an order, which is statutorily appealable in advance of judgment, by which the Superior Court denied its motion to compel arbitration of a dispute relating to its termination from employment of plaintiff William N. Stirlen, its Vice-President and Chief Financial Officer.

Stirlen commenced this action with a complaint that alleged causes of action based on various contract and tort theories, and that sought compensatory damages in contract and punitive as well as compensatory damages in tort.

Supercuts moved to compel arbitration under the arbitration provision of its employment contract with Stirlen. The Superior Court denied the motion, as we have said, on the ground that the arbitration provision was unenforceable as unconscionable. Supercuts timely appealed.

We shall assume, as have Stirlen and Supercuts, that the arbitration provision of Stirlen's employment contract with Supercuts is subject to the Federal Arbitration Act inasmuch as the employment contract itself evidences a transaction involving interstate commerce within the meaning of Section 2 of the Act.

But we note that, under the Federal Arbitration Act, the question whether, in the words of Section 2, a particular arbitration provision is "valid, irrevocable, and enforceable," or instead presents "grounds . . . for [its] revocation," is answered not by the act itself, but in the first instance by the law of the forum — which in the present case is Columbia.

The arbitration provision of Stirlen's employment contract with Supercuts — which Supercuts itself drafted in its entirety — states, in pertinent part, as follows: "In the event there is any dispute arising out of Executive's [i.e., Stirlen's] employment with Company [i.e., Supercuts], the termination of that employment, or the employment contract itself, whether such dispute gives rise or may give rise to a cause of action in contract or tort or based on any other theory or statute, Company and Executive agree that exclusive recourse for Executive shall be to submit any such dispute to final and binding arbitration and to obtain, if Executive prevails, compensatory damages only."

Under the law of Columbia, a contract, or a provision of a contract, is unenforceable if it is unconscionable. Unconscionability has both procedural and substantive aspects. The procedural aspect has to do with lack of freedom of assent, whereas the substantive aspect has to do with the imposition of harsh or oppressive terms. The view that prevails in Columbia is that both procedural and substantive aspects must be present, each at least in some degree, for unconscionability to be present.

The Superior Court determined that the arbitration provision of Stirlen's employment contract with Supercuts was procedurally unconscionable because the contract itself evidenced lack of freedom of assent because it was a contract of adhesion. We agree.

A contract of adhesion is a contract, usually with standard terms, that is drafted and imposed by a party of superior bargaining strength, and that allows a party of lesser bargaining strength only to take it or leave it.

Supercuts maintains that its employment contract with Stirlen is not a contract of adhesion because it did not have superior bargaining strength. Supercuts emphasizes that Stirlen was not a person desperately seeking employment, but a successful and sophisticated corporate executive. Supercuts sought him out and "hired" him "away" from a highly paid position with a major corporation "by offering him an annual salary of $150,000, and then agreeing to remunerative 'extras' not included in the standard executive employment contract," such as generous stock options, a bonus plan, a supplemental retirement plan, and a $10,000 "signing bonus."

We are not persuaded. Stirlen appears to have had no realistic ability to modify the terms of his employment contract with Supercuts. Undisputed evidence shows that the terms of the contract, which were cast in generic and gender-neutral language, were presented to him after he accepted employment and were described as standard provisions that were not negotiable. The only negotiating between Supercuts and Stirlen regarding the conditions of Stirlen's employment related to the stock options, bonus and retirement plans, and other "extras," but these matters were the subject of a separate letter agreement Stirlen executed more than a month before he signed the employment contract. Moreover, the letter agreement adverted to the "standard employment contract" Stirlen would be required to sign, noting that the terms of the letter agreement did not supplant but were "in addition to the standard provisions of the contract." Supercuts does not dispute Stirlen's assertions that the employment contract was presented to him on a "take-it-or-leave-it basis," and that every other corporate officer was required to sign, and did in fact sign, an identical agreement.

The Superior Court also determined that the arbitration provision of Stirlen's employment contract with Supercuts was substantively unconscionable because the provision itself was harsh and oppressive because it was unduly one-sided. Here too, we agree.

The arbitration provision of Stirlen's employment contract with Supercuts cannot be characterized other than as unduly one-sided. We shall overlook the fact that the provision expressly requires Stirlen to arbitrate any dispute that he may have with Supercuts, but impliedly allows Supercuts either to arbitrate or to litigate any dispute that it may have with Stirlen, as it chooses. Instead, we shall focus on this fact alone: The provision allows Supercuts — in effect, if not in terms — to engage in any and all "oppression" and "fraud" and "malice" against Stirlen, without running the risk of any award of even the most minimal punitive damages under Section 3294 of the Columbia Civil Code. Such a provision is unduly one-sided as a matter of law. It is settled in Columbia that any and all contracts or contractual provisions that exempt a contracting party from responsibility for its own oppressive, fraudulent, or malicious conduct are against the policy of the law.

In arguing to the contrary, Supercuts relies on several decisions of courts of sister states. Its reliance is misplaced. Each of those decisions involves the law of a state other than Columbia. More importantly, each deals with an arbitration provision that contains a mechanism for the award of treble damages, which are a species of punitive damages, inasmuch as by definition they amount to three times the compensatory damages in question, and are apparently given "for the sake of example and by way of punishing the defendant" (Colum. Civ. Code, § 3294). No such mechanism, however, is present here.

Lastly, we note that the Superior Court was not obligated to attempt to salvage any part of the arbitration provision of Stirlen's employment contract with Supercuts that might itself *not* be unconscionable. It has long been established that a court need not aid a party who has drafted an unconscionable contract, or contractual provision, by effectively redrafting what is objectionable into something unobjectionable. Indeed, we believe that a court *should* not provide any such aid even if it were otherwise minded to do so. A party who seeks the unmerited benefit of unconscionability must not be allowed to avoid its deserved burden.

For the reasons stated above, we conclude that the Superior Court correctly denied Supercuts' motion to compel arbitration because the arbitration provision of Supercuts' employment contract with Stirlen was unenforceable as unconscionable.

Affirmed.

Myers v. Scamardo Termite Control

Columbia Court of Appeal (1998)

In this action under the Columbia Consumer Sales Act, the Superior Court of Lucas County issued an order (1) granting a motion by the plaintiff for partial summary judgment declaring that an arbitration provision of a contract was unenforceable on the ground of unconscionability, and (2) denying a motion by the defendant to stay the action pending arbitration pursuant to that provision.

Under the Columbia Consumer Sales Act, an order determining the enforceability of an arbitration provision of a contract against a claim of unconscionability is appealable.

The defendant timely appealed the Superior Court's order.

For the reasons set out below, we shall affirm.

The plaintiff, Judith Myers, an elderly woman with limited resources, and defendant, Scamardo Termite Control (STC), entered into a contract: STC agreed to eradicate termites that had infested Myers' house; and, in exchange, Myers agreed to pay STC $1,300. The contract contained an arbitration provision, which reads as follows: "The Consumer and STC agree that any controversy or claim between them arising out of or relating to this contract shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the rules and procedures of the National Arbitration Organization then in force."

Having become dissatisfied with STC's service when termites reinfested her house, Myers brought this action under the Columbia Consumer Sales Act seeking, among other relief, (1) an award of $41,000 in compensatory damages, an award of $123,000 in treble damages as authorized by the act itself, and an award of $2,000,000 in punitive damages; and (2) a declaration that the arbitration provision of her contract with STC was unenforceable on the ground of unconscionability.

Thereupon, STC moved to stay the action pending arbitration pursuant to the arbitration provision of its contract with Myers, and Myers moved for partial summary judgment declaring that the provision was unenforceable on the ground of unconscionability. As noted, the Superior Court issued an order granting Myers' motion and denying STC's. It did so because it concluded that the arbitration provision was indeed unenforceable as unconscionable.

On appeal, both Myers and STC agree that the soundness of the Superior Court's order depends on the correctness of its conclusion on the unconscionability of the arbitration provision of their contract. To that question, we now turn.

The following facts are undisputed for present purposes: The arbitration provision of Myers' contract with STC requires that arbitration must be "conducted in accordance with the rules and procedures of the National Arbitration Organization [now] in force." A party seeking arbitration with the National Arbitration Organization must pay a filing fee — for example, $2,000 for a claim between $100,000 and $250,000, and $7,000 for a claim between $1,000,000 and $2,500,000. Because Myers is asserting a punitive damages claim in the amount of $2,000,000, she would have to pay a $7,000 filing fee. Even if Myers should choose to forgo her perhaps overly optimistic punitive damages claim, she still has a not unreasonable claim for treble damages under the Columbia Consumer Sales Act itself, in the amount of $123,000 — for which she would have to pay a $2,000 filing fee. A filing fee paid by Myers in the amount of $2,000 would exceed the sum of $1,300 that she paid on her contract with STC by a large percentage. Myers did not know at the time of contracting that she would be required to pay any filing fee whatsoever, less still one that would be so high. Although the National Arbitration Organization had, and still has, a published schedule of filing fees, none was attached to the contract or otherwise disclosed to Myers.

Under the law of Columbia, which Myers and STC agree applies here, a contract, or a provision of a contract, is unenforceable if it is unconscionable. As the court in *Stirlen v. Supercuts, Inc.* (Colum. Ct. App. 1997) recently held: "Unconscionability has both procedural and substantive aspects. The procedural aspect has to do with lack of freedom of assent, whereas the substantive aspect has to do with the imposition of harsh or oppressive terms. The view that prevails in Columbia is that both procedural and substantive aspects must be present, each at least in some degree, for unconscionability to be present."

In our judgment, unconscionability taints the arbitration provision of the contract between STC and Myers in both its procedural and substantive aspects.

As for procedural unconscionability, the contract between STC and Myers as a whole is plainly a contract of adhesion — that is to say, an instrument, usually with standard terms, drafted and imposed by a party of superior bargaining strength, allowing a party of lesser bargaining strength only to take it or leave it. Perhaps more significantly, the arbitration provision contains an unfair surprise — the undisclosed requirement that Myers would have to pay what must be characterized as arbitration fees that are exorbitant as to her. Such an unfair surprise could have been avoided by disclosure on the part of STC. But STC made no such disclosure.

As for substantive unconscionability, the arbitration provision of the contract between STC and Myers is harsh and oppressive because it effectively requires Myers to pay arbitration fees that are themselves harsh and oppressive because, as stated, they are

exorbitant as to her. We do not dwell in a fool's paradise, thinking that the National Arbitration Organization should provide arbitration without cost. Nor do we mean to suggest that its arbitration fees are out of line with the value of the services it provides. Rather, we conclude only that requiring a consumer in Myers' situation to pay such fees is harsh and oppressive. Harshness and oppressiveness could have been avoided by STC's agreement fee to pay such fees on Myers' behalf. But STC made no such agreement.

In sum, because the Superior Court was correct in its conclusion that the arbitration provision of the contract between STC and Myers is unconscionable, its order denying STC's motion to stay the action pending arbitration pursuant to that provision, and granting Myers' motion for partial summary judgment declaring that that provision was unenforceable on the ground of unconscionability, was altogether sound.

In this court, however, Myers seeks to obtain more than she received below, asking us to enjoin STC from attempting to enforce the arbitration provision here at issue against any consumer in the future. Her request comes too late. But even had it been timely, we would have rejected it. We would be reluctant to find the arbitration provision unconscionable, always and everywhere, and in the abstract, with respect to any and all consumers, no matter what their resources, with whom STC has contracted or may contract. First, and manifestly, unconscionability is in large part a judgment that arises from the unique facts of each individual case. Second, many, or at least some, consumers might in fact prefer arbitration over litigation — and might also prefer to avoid the premium that STC would presumably build into the contract price if it had to cover the risk of litigation and its costs.

For present purposes, however, all that we need do, and shall do, is to uphold the Superior Court's order denying STC's motion to stay the action pending arbitration and granting Myers' motion for partial summary judgment.

Affirmed.